A

RODWIN V BAHADUR v. CIMB BANK BHD & ANOR

HIGH COURT MALAYA, KUALA LUMPUR
FAIZAH JAMALUDIN JC
[CIVIL SUIT NO: WA-22NCVC-219-04-2018]
16 AUGUST 2018

B

CIVIL PROCEDURE: *Injunction – Interlocutory injunction – Application for – Application to prevent completion of sale and transfer of land pending resolution of suit – Whether applicant made full and frank disclosure – Failure to give undertaking in damages – Whether fatal – Balance of convenience – Whether court ought to exercise discretion in granting injunction*

C

CIVIL PROCEDURE: *Costs – Security for costs – Application for – Whether plaintiff 'ordinarily resident out of jurisdiction' – Whether plaintiff came within O. 23 r. 1(1)(a) and (b) of Rules of Court 2012 – Plaintiff's impecuniosity or alleged inability to pay costs – Whether sufficient to justify order for security for costs – Whether application ought to be dismissed*

D

The plaintiff entered into a flexi housing/shophouse loan agreement with the first defendant ('D1') ('the loan agreement'). Pursuant to the terms of the loan agreement, the plaintiff charged a piece of property ('the said land') to D1 as security for the loan. The plaintiff, however, failed to make the required monthly payments under the loan agreement. Subsequently, D1 filed an action at the High Court for vacant possession and sale of the said land ('the foreclosure action'). The High Court granted an order for sale of the said land ('order for sale'). The first auction date was vacated at D1's request as the plaintiff had made proposals for settlement which failed. A second auction date was fixed but there were no bidders. A third auction date was then fixed by D1 with a reserved price which was 10% less than the last reserve price. The said land had been valued by three different valuation companies on three different occasions. The third valuation of the said land was undertaken by the second defendant ('D2') who valued the said land at the market value of RM3,000,000. The said land was successfully auctioned off at the third auction for the price of RM2,730,000. Subsequent to the third auction, the plaintiff filed the present suit together with an application for an *ex parte* interim injunction ('encl. 3') to prohibit and/or prevent the completion of the sale and transfer of the said land pending the resolution of this present suit. This court converted the plaintiff's *ex parte* to an *inter partes* application for interim injunction. The plaintiff's suit against the defendants and his application for an interlocutory injunction against D1 was premised on his claim that D1 had in breach of s. 257(1)(d) of the National Land Code ('NLC') fixed the reserve price of the said land for the auction at below market value. According to the plaintiff, the alleged under valuation

E

F

G

H

I

rendered the order for sale of the said land null and void and/or defective. An application was also filed by D1 under O. 23 r. 1(1)(a) and (b) and/or this court's inherent jurisdiction under O. 92 r. 4 of the Rules of Court 2012 ('ROC') for, *inter alia*, an order that the plaintiff pay security for costs in the sum of RM100,000 to D1's solicitors as a stakeholder. It was submitted by D1 that the plaintiff was a citizen of Canada, thus the argument was that the plaintiff failed to prove that he was ordinarily resident within the jurisdiction.

Held (dismissing plaintiff's application for interlocutory injunction; dismissing first defendant's application for security for costs):

(1) The plaintiff had failed to make a full and frank disclosure in his application for the interlocutory injunction, which was made *ex parte* and subsequently converted to an *inter partes* application by this court. All *ex parte* applications must be made *uberrimae fide*. The applicant must make a full and frank disclosure to this court in his affidavit in support of the application for the injunction. The plaintiff did not disclose in his affidavit in support of encl. 3 that he was present at the High Court hearings where the auction dates and the reserve price were fixed. The plaintiff also failed to disclose that he did not make any objection to the reserve price fixed or that he had only asked for a postponement of the auction date as he was trying to reach a settlement with D1. The plaintiff had also failed to give the necessary undertaking of damages. It is trite law that the plaintiff's failure to give an undertaking in damages was fatal to his application for an interlocutory injunction. The balance of convenience herein laid in this court not exercising its discretion to grant the plaintiff the interlocutory injunction. The plaintiff's application in encl. 3 was therefore dismissed. (paras 33 & 37-39)

(2) It is an elementary principle of law that 'he who claims, proves'. Therefore, it was for D1 to prove that the plaintiff was 'ordinarily resident out of the jurisdiction' in order to fall within O. 23 r. 1(1)(a). The burden was not on the plaintiff to prove that he is 'ordinarily resident within the jurisdiction.' There was no evidence provided by D1 that the plaintiff was 'ordinarily resident out of the jurisdiction'. Furthermore, D1 neither asserted nor provided any evidence that the plaintiff was a nominal plaintiff who was suing for the benefit of another party pursuant to O. 23 r. 1(1)(b) of the ROC. Accordingly, as the plaintiff did not come within either O. 23 r. 1(1)(a) or (b) of the ROC, this court could not consider D1's application for security for costs. (paras 43-45)

(2a) The plaintiff's impecuniosity or alleged inability to pay costs on its own was insufficient to justify to this court to use its discretion to order the plaintiff to give such security for the defendant's costs in this action. Such an order for security would be oppressive on the plaintiff and would likely result in him not being able to proceed with this action. Thus, D1's application for security for costs was dismissed. (paras 47-49)

Case(s) referred to:

American Cyanamid Co. v. Ethicon Ltd [1975] AC 396 ***(refd)***

Asia Commercial Finance (M) Bhd & Anor v. Development & Realtor Sdn Bhd [1992] 2 CLJ 1175; [1992] 2 CLJ (Rep) 109 HC ***(refd)***

Badiaddin Mohd Mahidin & Anor v. Arab Malaysian Finance Bhd [1998] 2 CLJ 75 FC ***(refd)***

Cayne v. Global Natural Resources plc [1984] 1 All ER 225 ***(refd)***

Cheng Hang Guan & Ors v. Perumahan Farlim (PG) Sdn Bhd & Ors [1988] 2 CLJ 35; [1988] 1 CLJ (Rep) 435 HC ***(refd)***

Cook v. Whellock (1890) LR 24 QBD 658 ***(refd)***

Faridah Begum Abdullah v. Dato' Michael Chong [1995] 2 CLJ 951 HC ***(refd)***

Gateway Land Pte Ltd v. Turner (East Asia) Pte Ltd [1988] 2 CLJ 364; [1988] 2 CLJ (Rep) 732 HC ***(refd)***

GS Gill Sdn Bhd v. Descente Ltd [2010] 5 CLJ 613 FC ***(refd)***

Hock Hua Bank Bhd v. Sahari Murid [1980] 1 LNS 92 FC ***(refd)***

Keet Gerald Francis Noel John v. Mohd Noor Harun & Ors [1995] 1 CLJ 293 CA ***(refd)***

Rhodes v Dawson (1886) 16 QBD 548 ***(refd)***

Rohaya Ali Haidar v. AmBank (M) Bhd [2016] 4 CLJ 563 CA ***(refd)***

Sir Lindsay Parkinson & Co Ltd v. Triplan Ltd [1973] QB 609 ***(refd)***

Legislation referred to:

National Land Code, ss. 254, 257(1)(d)

Rules of Court 2012, O. 23 r. 1(1)(a), (b), O. 29 r. 1(2A), O. 92 r. 4

For the plaintiff - Rajendra Navaratnam & Sachpreetraj Singh Sohanpal; M/s YY Ho & Lee

For the 1st defendant - John Clark Sumugod & Tengku Nazihah Nawawi; M/s Sidek Teoh Wong & Dennis

Reported by Suhainah Wahiduddin

JUDGMENT
(encl. 3 & encl. 15)

Faizah Jamaludin JC:

Introduction

[1] These are my grounds of judgment in respect of the plaintiff's application for an interim interlocutory injunction (encl. 3) and the first defendant's application for security for costs (encl.15).

Background Facts

Default Of Loan Agreement And Auction Of Charged Property

[2] On 3 August 2012, the plaintiff entered into a flexi housing/shophouse loan agreement with the first defendant ("D1") for the loan sum of RM3,600,000 ("the loan agreement").

[3] Pursuant to the terms of the loan agreement, the plaintiff charged the property known as Lot 21778, Geran 222327, Ulu Langar, Bandar Country Heights (with the postal address No. 29, Persiaran Cinta Alam, Country Heights, 43000 Kajang, Selangor Darul Ehsan) ("the said land") to D1 as security for the loan.

[4] The plaintiff failed to make the required monthly payments under the loan agreement. D1 after sending a letter of demand to the plaintiff on 12 October 2015 and a notice terminating the loan agreement on 4 December 2015 sent the plaintiff on 23 December 2015, a Form 16D "Notice of Default With Respect to a Charge" pursuant to s. 254 of the National Land Code ("NLC"). D1 then filed an action at the Kuala Lumpur High Court for vacant possession and sale of the said land *via* Originating Summons No: WA-24FC-83-01-2016 ("foreclosure action").

[5] On 22 February 2016, the High Court granted an order for sale of the said land ("order for sale") pursuant to the said foreclosure action and fixed a tentative auction date on 16 April 2016 ("tentative auction date"). On D1's application and in the presence of the plaintiff, the court fixed an auction date on 21 November 2016 ("first auction"). The first auction date was vacated at D1's request as the plaintiff had made proposals for settlement in several letters from the plaintiff to D1. The proposed settlement failed. At the hearing of D1's application on 5 July 2017, in the plaintiff's presence, the court fixed a second auction date on 24 October 2017 ("second auction") with a reserve price of RM3,000,000 based on the market value of the said land by D2. There were no bidders at the second auction.

[6] On D1's application, the Deputy Registrar at a hearing on 9 January 2018, again in the plaintiff's presence, fixed a third auction date on 10 April 2018 ("third auction") with a reserve price of RM2,700,000 which is 10% less than the last reserve price in accordance with the "Arahan Amalan Pendaftar Mahkamah Tinggi Malaya Bil. 1/2014: Prosiding Halang Tebus dan Lelongan Awam Harta Tak Alih Di Mahkamah Tinggi Malaya".

[7] The said land had been valued by three different valuation companies on three different occasions. Details of the valuations are as follows:

(i) The first valuation was for purposes of the loan agreement by Nawawi Tie Leung Property Consultants Sdn Bhd. The land was valued as at 3 August 2012 at the market value of RM4,500,000 ("first valuation").

A (ii) The second valuation was undertaken by Cheston International KL Sdn Bhd for purposes of the auction pursuant to the order for sale. The said land was valued at the market value of RM3,770,000 as at 18 November 2015 ("second valuation").

B (iii) The third valuation of the said land was undertaken by the second defendant ("D2") also for purposes of the auction at D1's request. D2 valued the said land at the market value of RM3,000,000 as at 27 March 2017 ("third valuation").

[8] The said land was successfully auctioned off at the third auction on C 10 April 2018 for the price of RM2,730,000.

This Present Suit

[9] Subsequent to the third auction, the plaintiff on 20 April 2018 filed this present suit together with an application for an *ex parte* interim injunction (encl. 3) to prohibit and/or prevent the completion of the sale and the D transfer of the said land pending the resolution of this present suit.

[10] This court converted the plaintiff's *ex parte* to an *inter partes* application for interim injunction and at a case management on 3 May 2018 fixed the hearing date of the *inter partes* application and gave directions for the parties to file their affidavits and their written submissions. Pending the disposal of E the *inter partes* hearing of encl. 3, this court granted an *ad interim* injunction prohibiting the completion of the sale and the transfer of the said land.

[11] For the reasons discussed herein, upon considering all the facts and after hearing the submission of counsels for the plaintiff and D1, I dismissed F the plaintiff's application for interlocutory injunction. I also dismissed D1's application for security for costs. No orders as to costs were made for either application.

Enclosure 3: Plaintiff's Application For Interlocutory Injunction

[12] The plaintiff's suit against the defendants and his application for an G interlocutory injunction against D1 is premised on his claim that D1 had in breach of s. 257(1)(d) of the NLC fixed the reserve price of the said land for the auction at below market value. The plaintiff claims the alleged under valuation rendered the order for sale of the said land null and void and/or defective by reason of non-compliance of s. 257(1)(d) of the NLC.

H

[13] It is the plaintiff's case that the order for sale of the High Court can be set aside as of right by way of an institution of a fresh action in the High Court (ie, this present suit) on the basis that the said order for sale is null, void and/or defective as it is in breach of s. 257(1)(d) of the NLC. The plaintiff cites the Federal Court case of *Badiaddin Mohd Mahidin & Anor v.* I

Arab Malaysian Finance Bhd [1998] 2 CLJ 75; [1998] 1 MLJ 393; [1998] 1 AMR 909 as authority to support its contention that this court has the inherent power to set aside its orders made in breach of written law. In *Badiaddin*, the Federal Court held that the High Court had the necessary jurisdiction to set aside an earlier order of the High Court on the basis of the *ex debito justitiae* principle as the earlier order was in violation of written law, namely the Malay Reservations Enactment (FMS Cap 142).

Law On Interim Injunction

[14] An interlocutory injunction is a discretionary remedy. The *locus classicus* on the subject is the House of Lords' decision in *American Cyanamid Co. v. Ethicon Ltd* [1975] AC 396, which has been applied by our courts in determining whether or not to grant an interlocutory injunction. The Court of Appeal in *Keet Gerald Francis Noel John v. Mohd NoorHarun* [1995] 1 CLJ 293; [1995] 1 MLJ 193; [1995] 1 AMR 373, applying the principles set-out in *American Cyanamid* summarised the steps that a judge has to take in deciding whether or not to grant an interlocutory injunction. The steps are:

(i) Is there a *bona fide* serious issue to be tried;

(ii) Where does the balance of convenience lie; and

(iii) Whether the plaintiff has given an undertaking in damages.

[15] Once the judge finds there is a *bona fide* serious issue to be tried, he then has to consider the balance of convenience. "Balance of convenience" is a shorthand phrase for "the balance of the risk of doing injustice". It is explained by May LJ in *Cayne v. Global Natural Resources plc* [1984] 1 All ER 225:

> That (the 'balance of convenience') is the phrase which, of course, is always used in this type of application. It is, if I may say so, a useful shorthand, but in truth, and as Lord Diplock himself made clear in the *NWL* case, the balance that one is seeking to make is more fundamental, more weighty, than mere 'convenience'. I think that it is quite clear from both cases that, although the phrase may well be substantially less elegant, the 'balance of the risk of doing an injustice' better describes the process involved.

[16] In deciding where the balance of convenience lies, the judge must weigh the harm that the injunction would produce to the defendant against the harm that would result to the plaintiff from refusing to grant the injunction. In doing so, the judge can consider the relative financial standing of the parties in the case and whether damages would be an adequate alternative remedy for the plaintiff.

[17] In undertaking both these steps, Gopal Sri Ram JCA in *Keet Gerald Francis Noel John* said that:

> *…, the Judge must have in the forefront of his mind that the remedy that he is asked to administer is discretionary, intended to produce a just result for the period between the date of the application and the trial proper and intended to maintain the status quo,* an expression explained by Lord Diplock in *Garden Cottage Foods Ltd. v. Milk Marketing Board* [1984] AC 130 and applied in *Cheng Hang Guan (supra)*. It is a judicial discretion capable of correction on appeal. Accordingly, the Judge would be entitled to take into account all discretionary considerations, such as delay in the making of the application or any adequate alternative remedy that would satisfy the plaintiff's equity, such as an award of monetary compensation in the event that he succeeds in establishing his claim at the trial. Any question going to the public interest may, and in appropriate cases should, be taken into account. A Judge should briefly set out in his judgment the several factors that weighed in his mind when arriving at his conclusion. (emphasis added)

Analysis

(i) Are There Bona Fide Serious Issues To Be Tried?

[18] The plaintiff contends that there are serious issues that have to be tried, namely that the order for sale is void as D1 has breached the requirements of s. 257(1) of the NLC and that D1 had breached its duty of care in respect of the plaintiff's residual interest as a chargor of the said land.

[19] Section 257 of the NLC states as follows:

> 257. Matters to be dealt with by order for sale
>
> (1) Every order for sale made by the Court under section 256 shall be in Form 16H and shall:
>
> …
>
> (d) require the Registrar of the Court to fix a reserve price for the purpose of the sale, being a price equal to the estimated market value of the land or lease in question;

[20] It is the plaintiff's case that in breach of s. 257(1)(d) of the NLC, that the reserve price fixed based on the third valuation report was grossly below market value; thus making the order for sale and all subsequent orders for the execution of sale null and void and/or defective.

[21] The plaintiff submits that the said land was undervalued by D2 because they had only taken a "cursory external inspection" of the said land when valuing it; D2 had failed to take into consideration the actual condition of the building and amenities of the said land and the internal fitting and fixtures of the building on the said land; had referred to sale comparables of

empty plots of land, which the plaintiff submits "were in no way similar to the said land"; and took into account comparable properties that were sold in 2015 and 2016, which the plaintiff claims were not representative of the value of the said land in 2018. The plaintiff submits that its own appointed valuers, Transasia Property Consultants Sdn Bhd had valued the market value of the said land as at 2 May 2018 as RM4,000,000.

[22] The plaintiff also argues that D1 has a duty to take reasonable care in ensuring that the said land was sold at market value. The plaintiff supports this proposition with the case of *Asia Commercial Finance (M) Bhd & Anor v. Development & Realtor Sdn Bhd* [1992] 2 CLJ 1175; [1992] 2 CLJ (Rep) 109; [1992] 2 MLJ 504 where Edgar Joseph Jr J (as His Lordship then was) held that a chargee in exercising its power to sell under the NLC owes a duty to a chargor, which duty flows from equity's recognition that a chargor has an interest in the surplus, if any, arising from the sale. The plaintiff says that D1 upon receiving the valuation report from D2 ought to have recognised that there was a significant difference between the first valuation and the third valuation and should have been put on inquiry to examine further D2's valuation report.

[23] D1 disagrees that there is any *bona fide* serious issue to be tried in this suit. D1 submits that the plaintiff should have appealed the High Court's decision to grant the order for sale in the foreclosure action. It is D1's case that this court is *functus officio* because the order for sale has been executed with the successful public auction of the said land. D1 cites the decision of the Federal Court in *Hock Hua Bank Bhd v. Sahari Murid* [1980] 1 LNS 92; [1981] 1 MLJ 143 and the decision of the Court of Appeal in *Rohaya Ali Haidar v. AmBank (M) Bhd* [2016] 4 CLJ 563; [2016] 2 MLJ 819; [2016] AMEJ 0889 as authorities to support its argument that this court is *functus officio*.

[24] The Federal Court in *Hock Hua Bank Bhd* held that the court had no power under any application in the same action to alter, vary or set aside a judgment regularly obtained after it has been entered or an order after it has been drawn up, except under the slip rule, so far as it necessary to correct errors in expressing the intention of the court, unless it is a judgment by default or made in the absence of a party at a trial or hearing. In *Rohaya bt Ali Haidar*, the Court of Appeal held that where an order for sale was granted by the High Court and a certificate of sale issued in accordance with the provision of the NLC, the court is *functus officio* in respect of all proceedings under the order for sale and the court has no power to set aside the said order by way of a separate application or otherwise.

(ii) Where Does The Balance Of Convenience Lie? Are Damages An Adequate Remedy To Compensate The Plaintiff?

[25] The plaintiff in the statement of claim had prayed for a declaration that the order for sale is null and void; and/or an order to set aside the order for sale. He had also prayed in the alternative for damages of RM1,000,000 or damages to be assessed for the plaintiff's alleged breach of s. 257(1)(d) of the NLC.

[26] I agree with the D1's submission the fact that the plaintiff seeks damages as an alternative remedy means that damages would be an adequate alternative remedy to compensate the plaintiff for the alleged undervaluing of the said land.

(iii) Has The Plaintiff Given An Undertaking For Damages?

[27] It is settled law that a party applying for an interlocutory injunction must give an undertaking to the court as to damages in the event the interlocutory injunction was wrongly granted: see *Keet Gerald Francis* and *American Cynamid*. Learned counsel for the plaintiff himself submitted that an express undertaking as to damages is required for an application for an interlocutory injunction. He referred to the case of *Cheng Hang Guan & Ors v. Perumahan Farlim (PG) Sdn Bhd & Ors* [1988] 2 CLJ 35; [1988] 1 CLJ (Rep) 435; [1988] 3 MLJ 90; [1994] 1 AMR 201.

[28] However, the plaintiff failed to give the necessary undertaking as to damages. The undertaking given by the plaintiff in his affidavit in support of his application for an interlocutory injunction is as follows:

> 32. I hereby undertake to comply with any award for damages that may be made by this Honourable Court in the event the reliefs prayed here are not granted.

[29] The purpose of the undertaking for damages by a plaintiff is that if the injunction was wrongly granted by the court and the defendant suffered damages as a result of the injunction, the court can order an inquiry to damages suffered by the defendant on the undertaking given by the plaintiff for the interlocutory injunction given. In *GS Gill Sdn Bhd v. Descente Ltd* [2010] 5 CLJ 613; [2010] 4 MLJ 609 the Federal Court held that:

> The undertaking to damages for an interlocutory injunction is given to the court and not to the defendant. The trial judge is the best equipped to decide on whether to order an inquiry as to damages since he has adequate knowledge of the facts of the case. As a general rule, if an interlocutory injunction is wrongly granted, the trial judge should make an order for inquiry to damages on the undertaking given by the plaintiff for the interlocutory injunction.

[30] In this present case, the plaintiff undertook to comply with any award of damages in the event his application for an interlocutory injunction as prayed in encl. 3 is not granted. This undertaking, with respect to the plaintiff, does not make any logical sense. If this court does not grant the interlocutory injunction, D1 will surely not be in a position to suffer any damages as a result of a wrongfully granted injunction. This is because there would be no injunction to prohibit or prevent D1 from completing the sale and transfer of the said land to the successful bidder. The undertaking that the plaintiff should have given was that he would comply with any award of damages for any damages suffered by D1 due to the interlocutory injunction granted against it.

Decision

[31] Based on the application and the submission of counsel but without going into the merits of the case, in my view there is a *bona fide* issue to be tried. The issue is whether this court is *functus officio* to hear the plaintiff's challenge to the order for sale.

[32] The plaintiff claims that its application falls under the special exception held by the Federal Court in *Badiaddin* namely that the order for sale was made in contravention of s. 257(1)(d) of the NLC. The question for this court's consideration is whether the reserve price fixed on an alleged undervaluation is a breach of written law and falls within the special exception held in *Badiaddin*. Also, to be considered is whether the plaintiff being present at the High Court hearings and not objecting to the reserve price set for the public auction, which was based on the "market value" in the third valuation report is estopped from now claiming that the reserve price fixed by the court for purposes of the public auction was not "a price equal to the estimated market value" of the said land as stipulated in s. 257(1)(d) of the NLC.

[33] The plaintiff had failed to make a full and frank disclosure in his application for the interlocutory injunction, which was made *ex parte* and subsequently converted to an *inter partes* application by this court. It is settled law that all *ex parte* applications must be made *uberrimae fide*. The applicant must make a full and frank disclosure to this court in his affidavit in support of the application for the injunction. The plaintiff did not disclose in his affidavit in support of encl. 3 that he was present at the High Court hearings where the auction dates and the reserve price were fixed. The plaintiff also failed to disclose that he did not make any objection to the reserve price fixed or that he had only asked for a postponement of the auction date as he was trying to reach a settlement with D1.

[34] Order 29 r. 1(2A) of the Rules of Court 2012 expressly states that:

> 2A The affidavit in support of an application made *ex parte* must contain a clear and concise statement of:
>
> (d) any answer by the other party (or which he is likely to assert) to the claim or application;
>
> (e) any facts which may lead the Court not to grant the application *ex parte* or at all.

[35] In my view, D1 would likely raise the fact that the plaintiff was at the court hearings when the auction dates and the reserve price were fixed and the fact that he did not object to the reserve price fixed as answers to the plaintiff's claim that the order for sale was defective because of the alleged undervaluation.

[36] The plaintiff had prayed in the statement of claim for the alternative relief of damages in the sum of RM1,000,000 or damages to be assessed. Based on this prayer for damages, I find that damages would be an adequate alternative remedy for the plaintiff.

[37] Although I have found that there is a *bona fide* issue to be tried, I also found that the plaintiff had failed to fully and frankly disclose all material facts in his application for the injunction. He had also failed to give the necessary undertaking of damages. It is trite law that the plaintiff's failure to give an undertaking in damages to this court is fatal to his application for an interlocutory injunction.

[38] Therefore, for the above reasons, I find that the balance of convenience lies in this court not exercising its discretion to grant the plaintiff the interlocutory injunction.

[39] Accordingly, the plaintiff's application in encl. 3 is dismissed with no order as to cost.

Enclosure 15: D1's Application For Security For Costs

[40] D1's application in encl. 15 is made under O. 23 r. 1(1)(a) and (b) and/or this court's inherent jurisdiction under O. 92 r. 4 of the ROC for, *inter alia*, an order that the plaintiff pays security for costs in the sum of RM100,000 to D1's solicitors as a stakeholder.

[41] Order 23 r. 1(1)(a) and (b) of the ROC states as follows:

> 1. (1) Where, on the application of a defendant to an action or other proceedings in the Court, it appears to the Court:
>
> (a) that the plaintiff **is ordinarily resident out of the jurisdiction;**
>
> (b) that **the plaintiff** (not being a plaintiff who is suing in a representative capacity) **is a nominal plaintiff who is suing for the benefit of some other person** and that there is reason to believe that he will be unable to pay the costs of the defendant if ordered to do so;

A

…

then, if, having regard to all the circumstances of the case, the Court thinks it just to do, it may order the plaintiff to give such security for the defendant's costs of the action or other proceedings as it thinks just. (emphasis added)

B

[42] D1's application is based on the fact that the plaintiff a citizen of Canada. D1's counsel in his submissions argues that the plaintiff failed to prove that he is ordinarily resident within the jurisdiction.

C

[43] With respect to learned counsel, it is an elementary principle of law that "he who claims, proves". Therefore, it is for D1 to prove that the plaintiff is "ordinarily resident out of the jurisdiction" in order to fall within O. 23 r. 1(1)(a). The burden is not the plaintiff to prove that he is "ordinarily resident within the jurisdiction".

D

[44] D1 did not provide any evidence that the plaintiff is "ordinarily resident out of the jurisdiction". Furthermore, D1 neither asserted nor provided any evidence that the plaintiff is a nominal plaintiff who is suing for the benefit of another party pursuant para. (b) of O. 23 r. 1(1).

E

[45] Accordingly, as the plaintiff does not come within either sub-ss. (a) or (b) of O. 23 r. 1(1), this court cannot consider D1's application for security for costs under O. 23 r. 1(1)(a) and (b) of the ROC.

[46] The next issue for consideration is whether court should exercise its inherent jurisdiction under O. 92 r. 4 of the ROC to order the plaintiff to give the security for D1's costs on the grounds of the plaintiff's impecuniosity.

F

[47] It is settled law that the plaintiff's impecuniosity or alleged inability to pay costs on its own is insufficient to justify to this court to use its discretion to order the plaintiff to give such security for the defendant's costs in this action. Ariffin Zakaria J (as His Lordship then was) in *Faridah Begum Abdullah v. Dato' Michael Chong* [1995] 2 CLJ 951; [1995] 2 MLJ 404 citing with approval the cases of *Rhodes v Dawson* (1886) 16 QBD 548 and *Cook v. Whellock* (1890) LR 24 QBD 658 held that bankruptcy or impecuniosity should not by itself be a ground for ordering security for costs. In the Singapore High Court case of *Gateway Land Pte Ltd v. Turner (East Asia) Pte Ltd* [1988] 2 CLJ 364; [1988] 2 CLJ (Rep) 732; [1988] 1 MLJ 416, Sinnathuray J (as he then was) gave the same consideration as Lord Denning MR and Cairn LJ in English Court of Appeal in *Sir Lindsay Parkinson & Co. Ltd v. Triplan Ltd* [1973] QB 609 where impecuniosity alone was insufficient for the court to order security for costs against a plaintiff especially if an order for security for costs may well result in the plaintiff being unable to proceed at all with its claim against the defendants.

G

H

I

A **[48]** Accordingly, in my view, it would not be a correct exercise of this court's discretion to make an order for security for costs just because the plaintiff is impecunious. Such an order for security would in the circumstances be oppressive on the plaintiff and would likely result in him not being able to proceed with this action.

B **[49]** Having regard to foregoing, I hereby dismiss D1's application for security for costs with no order as to costs.

C

D

E

F

G

H

I